IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 85

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF MUSCATINE, IOWA,

and

ELMER E. JOHNSON, for himself and the users of natural gas in the City of Greenfield, Iowa, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR CENTRAL STATES ELECTRIC COMPANY.

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Of Counsel.

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INTRODUCTION.

Although briefs have been filed herein by the City of Muscatine and the Federal Power Commission, this brief is addressed only to the brief of the Commission inasmuch as Respondents' briefs present substantially the same issues.

I.

The Federal Power Commission did not state all of the questions presented and misstated the position taken by petitioner.

The Federal Power Commission, in its brief, failed to state all of the questions presented. The Commission is in error when it states (Commission's brief 2) that the only orders of the Court of Appeals of which review is sought were those entered on February 14, 1944, in which the court awarded the fund representing the excess of gas rates collected from the petitioner, to the local officials on behalf of the ultimate consumers, and in which petitioner's first intervening petition, claiming the fund on the ground of equity, was denied. The fact is that petitioner made it clear in its petition for certiorari and in its brief, that it is also seeking review of the order entered by the court below on March 11, 1944, in which the court denied the claim asserted by petitioner in its supplemental intervening petition. This supplemental petition was not, as stated by the Commission (Commission's brief 10) a mere petition for rehearing. It was the assertion of a new and different claim to the fund by petitioner (after the court below had refused to extend jurisdiction to hear petitioner's original claim based on equitable grounds), in which petitioner claimed the fund on the ground that it was entitled thereto as a matter of legal right, since it was the party who had paid the excessive charges to the natural gas companies, and since the court could not properly exercise equitable jurisdiction to determine the claims of the ultimate consumers inasmuch as that involved a fixing of retail rates by the court.

The questions presented for review are, therefore, not merely, as stated by the Commission, whether the court

below erred in ordering payment of the fund to "local officials on behalf of the ultimate consumers rather than to petitioner, * * * subject to the assertion of petitioner's claim as against the consumers in any tribunal having jurisdiction to determine it" (Commission's brief 2), but also included the questions of whether the court erred in failing to find petitioner was entitled to the fund as a matter of legal right, whether it was the mandatory duty of the court below to exercise its jurisdiction to adjudicate petitioner's legal rights in the fund rather than to relinquish jurisdiction over the fund, and whether the court below was without jurisdiction to award the fund to the ultimate consumers on the basis of equity, when to do so involved a fixing of local rates by the court, which was a legislative and not a judicial function and one exclusively within the power of the State.

II.

The Power Commission's argument that the fund in dispute equitably belongs to the ultimate consumers is unsound and cannot properly be asserted in this proceeding.

One of the grounds on which the Commission in its brief seeks to justify the action of the court below is that the impounded fund equitably belongs to the ultimate consumers. In support of that contention the Commission first refers to certain of the findings contained in the opinions of the court below to the effect that the consumers are equitably entitled to the fund, and the Commission also sets out an extensive argument to that effect based on some of the facts which are alleged in petitioner's first intervening petition.

Such argument is improperly asserted in this proceeding, for the reason that the court below refused to hear

or consider any facts or evidence in support of petitioner's equitable claim to the fund, the court finding that it did not have jurisdiction to entertain such a claim. The Commission, nevertheless, seeks in its brief to create the inference that the court below fully weighed the equities as between the ultimate consumers and petitioner, and had decided them upon hearing in favor of the consumers. In this connection the Commission refers to various findings contained in the opinions of the court below to the effect that the distributing utilities were "merely conduits by which natural gas transported by (Pipeline) was delivered *to customers by utilities*," that "the price paid" by such distributing utilities was included in the utilities' bills to their consumers, and that since the Commission's proceedings were instituted to reduce the natural gas cost to the distributing utilities "for the benefit of the consumers" the distribution of the fund to such utilities would constitute a "windfall" to them. (R. 62; Commission's brief 6)

While it is true that the court below delivered itself of such expressions of opinion and directed payment of the fund in dispute to the treasurers of the four municipalities on behalf of the ultimate consumers, it is, nevertheless, incontrovertible that no actual trial was had; nor was any consideration given by the court below to the equities alleged by petitioner in support of its claim in its first petition. This clearly appears from the wording of the various orders entered by the court below, wherein it is recited that "it appearing that petitioner bases its prayer for relief on the ground that its gas rates are, and have been inadequate, and the reasonableness of petitioner's rates being a matter beyond the jurisdiction of this Court, * * * It is ordered, adjudged and decreed that the petition of the intervenor, Central States Electric Company, be, and the same is hereby denied * * * without prejudice to its making claim of adjustment with the cities of Muscatine, Greenfield, Knoxville and Pella, all of the State of Iowa,

or with the consumers of gas furnished by it in said cities" (R. 129). "The above entitled matter coming on to be heard and the parties being unable to stipulate or agree upon the facts or upon the rights of the parties, * * * And it appearing that a part of said refund belongs to the consumers of gas residing in the Cities of Muscatine, Greenfield, and Knoxville, and Pella, all of the State of Iowa * * * And the Court being desirous of paying, at the earliest possible date, to such parties as are entitled to the same, and to permit of a determination of said rights by a Court or body having jurisdiction thereof, and deeming itself duly advised in the premises" (R. 130-131), it was therefore ordered that the funds be paid over to the treasurers of the four municipalities. From the foregoing excerpts alone it is clear that the court below did not hear petitioner's equitable claim. Under such circumstances it is highly improper for the Commission to argue in this proceeding as though the court below fully weighed the equities of the respective claimants and extended a full hearing to petitioner on its equitable claim, and improper for the Commission to ask this court to affirm the decree of the court below as though petitioner's equitable claim had been extended a full hearing on the merits and adversely decided.

The chief arguments of the Commission, based on the partial facts which appear in the pleadings, and on which no evidence was taken, as to why the ultimate consumers were equitably entitled to the impounded fund are summarized and disposed of as follows:

The first argument is to the effect that since petitioner was making a profit on its local distribution of natural gas during the refund period, it necessarily follows that the cost of gas at wholesale was passed on in its entirety to the ultimate consumers. In support of its statement that petitioner was making a profit on its local distribution,

the Commission refers to certain figures in the record which indicate that gas was being distributed in the City of Muscatine at a net profit amounting to 1½ per cent in 1941. This profit, however, did not represent the operations of petitioner but of Iowa Electric Company, which conducted the retail business of distributing gas in Muscatine (R. 115A). As a matter of fact, the only figures in the record which are available bearing on the question of petitioner's operations disclose that:

> "• • • The average yearly revenue during this period (1932-1941) amounted to $109,790.32, and the average annual expenses, including taxes, amounted to $81,567.96, leaving an average balance of $28,222.36 before proper depreciation and adequate return on investment, averaging $44,934.24 annually. Thus the average yearly loss has been $16,711.88." (R. 59)

It is, therefore, apparent from the face of the record that petitioner was not even making a profit and that neither petitioner nor Iowa Electric Company was earning a fair return on its investment during the refund period. In the face of this fact the presumption sought to be indulged in by the Commission that "the rates which Pipeline charged to petitioner were included in their entirety in the rates charged the ultimate customers" (Commission's brief 21) is not a proper one.

The Commission's next argument is that the existing retail rates received by petitioner from its customers must be presumed to have been fair and reasonable during the refund period, from which the Commission argues that had it not been for the entry of the stay order by the court below the consumers would have been entitled immediately to a reduction in local rates "measured by the reduction in rates charged to petitioner" (Commission's brief 21). This contention is based upon a false premise in the first instance, namely, that petitioner's retail rates must be presumed to have been fair and adequate, whereas peti-

tioner's allegations (on which no evidence was heard) were that petitioner was not earning a fair return, and the only evidence in the record is that petitioner was operating at an annual loss (R. 59). In the second place, this presumption of the Commission is based upon the equally false premise that every reduction in the wholesale rate warrants a measurable reduction in the retail rate. Such a presumption ignores the fundamental concept that a utility is entitled to earn not only a profit but a fair return on its investment, and that it is for the local regulatory body to determine whether in any given case a reduction of wholesale rates warrants a measurable reduction in retail rates.

Following up the argument that the entry of the stay order prevented the consumers from procuring an immediate reduction in local rates "measured by the reduction in rates charged to petitioner," the Commission argues that the consumers were deprived of a benefit which, if allowed to be retained by petitioner, would result in a windfall. Since, however, the conclusion of the Commission is based on a faulty premise not supported by facts, the conclusion is unsound. As previously pointed out, there is no evidence in the record warranting the finding that petitioner's retail rates included the excess charges paid by petitioner to the natural gas companies, and no basis for any presumption that such is the fact. The Commission, in order to prove that such a measurable reduction would have been made except for the stay order, states the fact to be that after the wholesale rate reduction finally became operative "just such a retail rate reduction was put into effect." In support of this statement the Commission refers to the fact that the City of Muscatine, by ordinance adopted on February 4, 1943, fixed a reduced schedule of retail rates in that City (R. 113-114). There is nothing in the record to show that the reduction effected by this ordinance is comparable in amount to the wholesale rate reduction

effected by the Commission, and it is impossible without full hearing and an opportunity for petitioner to adduce proof for any determination to be made thereon. In the statement filed by petitioner with the court below on June 29, 1942 (prior to the reduction of the local rates), it was stated "the new rate schedule ordered by the Federal Power Commission affords considerable relief, but does not quite cover adequate return and depreciation, and, of course, does nothing to compensate for past losses sustained." Petitioner is confident that, given the opportunity in a proper jurisdiction, it can establish that the rate reduction effected by the 1943 ordinance just mentioned does not effect a reduction of petitioner's local rates measured by the reduction in the wholesale rates charged to petitioner which was ordered by the Commission.

Petitioner submits that it is clear from the foregoing that the Commission's arguments as to why the equities are with the ultimate consumers are unsound, in that they are not based on fact, that there are not sufficient facts in the record from which a proper determination of the equities could be made, and that in the proceedings in the court below facts which support petitioner's equities were not heard or considered, nor did the court below, in the final analysis, purport to make a finding of the equities upon full hearing. The Commission is, therefore, in the position of asking this Court to act as a trial court and make findings based on an incomplete record.

III.

Payment of the fund to the ultimate consumers as reparations because of excessive local rates constitutes fixing rates by the court below.

Petitioner argued at length in its original brief that the payment of the impounded fund to the ultimate consumers,

which was directed by the court below on the ground that the consumers were equitably entitled to the fund, was necessarily based upon a finding that the local rates paid by the consumers during the refund period were excessive and included the excess rates paid by petitioner to the natural gas companies during that period. Petitioner submits that the awarding of the fund to the consumers on that basis has the effect of reducing the rates paid by the consumers and necessarily constitutes a fixing of local rates by the court below, which is beyond the jurisdiction of a federal court since the matter of local rate regulation is exclusively within the power of the several states.

The Power Commission, in its brief, has sought to avoid this point by maintaining, first, that the distribution of the impounded fund did not amount to prescribing or fixing rates by the court but was in the nature of a reparation proceeding, and, second, that under the authority of *United States* v. *Morgan*, 307 U. S. 183, the court was under a mandatory duty to distribute the fund to the persons equitably entitled thereto.

The Commission, in support of its first contention cites the case of *Arizona Grocery Company* v. *Atchison, T. & S. F. R. R.*, 284 U. S. 370. That case, in which it was held by this Court that the Interstate Commerce Commission cannot award reparations with respect to shipments which moved under rates approved or prescribed by it, is clearly distinguishable from the instant case. Although it is true that in the course of its opinion this Court pointed out that the Commission could, under its statutory authority, award reparations in cases where it found that merely *legal* rates (those promulgated by the carriers but not approved or prescribed by the Commission) were unreasonable and likened that function to a judicial function as distinguished from cases where the Commission was exercising its statutory power to authorize or prescribe lawful rates, the final

decision of this Court was that the Commission had no authority to award reparations as to *lawful* rates. The Power Commission, in pointing out the distinction made by this Court as between the judicial function of awarding reparations and the legislative function of fixing rates, overlooked the fact that under the real ruling in the case neither a court nor a commission with statutory authority to order reparations is empowered to do so as to rates which have been *lawfully* fixed, i.e. by a Commission pursuant to statutory authority.

In the instant case the local rates had been *lawfully* fixed by ordinance of the various municipalities involved, who were the only bodies having authority under the Iowa law to fix rates. No federal court has the power, therefore, to award reparations from those rates, which the Power Commission seems to contend is the nature of the present proceeding. If this Court has refused to permit the Interstate Commerce Commission to award reparations which would have the effect of making a retroactive change in rates previously fixed by it over which it had jurisdiction in the first place, then certainly this Court will not permit the court below to retroactively fix local rates on the ground of awarding reparations when neither that court nor the Power Commission ever had any jurisdiction over such rates.

The instant case falls clearly within the class of cases in which this Court has previously stated that a federal court cannot distribute an impounded fund (representing rates collected while an injunction is in force) in a manner which would be the equivalent of rate-making. In the case of *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264 (heretofore cited by petitioner and attempted to be distinguished by the Power Commission), the gist of the decision of this Court was that where the court below conditioned the issuance of an injunction

against a confiscatory rate upon the company's consent that rates in excess of 50 cents should be distributed to the company's customers, *out of funds previously impounded* representing rates charged to customers ranging from 45 to 60 cents, the "practical effect" of imposing such a condition upon the company was to make it surrender the right to invoke a distinctively state legislative function, to wit, rate-making, and was, therefore, invalid.

In the case of *Newton* v. *Consolidated Gas Company*, 258 U. S. 165 (previously cited by petitioner and attempted to be distinguished by the Power Commission), this Court held that "it was error to direct ultimate distribution of the impounded fund in accordance with any subsequently approved rate. Rate-making is no function of the courts and should not be attempted either directly or indirectly. After declaring the 80-cent rate confiscatory the court should not have attempted, in effect, to subject the company for an indefinite period to some unknown rate to be proclaimed in the future, upon consideration of conditions then prevailing."

If the instant case be likened to a reparation proceeding, then the test of the jurisdiction of the court below to award reparations as against the local retail rate, which was in force during the refund period, is no different because the court has possession of funds belonging to petitioner, which represent excess charges paid by it to the natural gas companies, than if the case were one wherein the ultimate consumers were seeking to bring an action before that court directly against petitioner for the recovery of local rates paid by the consumers to petitioner. In the latter case the court below has itself already gone on record to the effect that any attempt by it to award such reparations would clearly constitute rate-fixing.

Thus in the case of *Natural Gas Pipeline Company* v. *Federal Power Commission*, 141 F. (2d) 27, a customer of

the utility company, for himself and on behalf of other customers, petitioned the court below to order the utility to refund a portion of its charges for gas for a certain period of time measured by the reduction in the cost of natural gas which it had purchased from the pipeline company for that period. In dismissing the petition the court below stated:

> "What petitioner now asks, is to have this court ascertain that there were excess collections from him and the amount thereof. But the only way that we could do this would be to usurp the functions of the Illinois Commerce Commission by fixing what we consider would have been a reasonable rate for the Peoples Company to charge during the period in question, and the specific class or classes of customers entitled to a refund by reason of the Company's charges in excess thereof. We refuse to do so because this court has no rate-making powers. *Peoples Gas Light & Coke Co.* v. *Slattery*, 373 Ill. 31, 48, 25 N.E. 2d 482; *Chicago, Milwaukee & St. Paul R. Co.* v. *State Utilities Commission*, 268 Ill. 49, 57, 108 N.E. 729; *Mills* v. *People's Gas Light & Coke Co.*, 327 Ill. 508, 536, 537, 158 N.E. 814."

The only distinction between the above decision and the instant case is that in the instant case the court below is in possession of moneys belonging to petitioner although not moneys directly paid by the consumers. The Federal Power Commission contends, however, that the possession of this fund by the court below is sufficient to invest it with jurisdiction to make reparations against the rates paid by the consumers during the refund period. Such action is just as much an exercise of rate-making power by the court as would be the rendering of a judgment against petitioner if petitioner were being sued directly by the consumers in the same court for reparations in respect of the retail rates paid by it during the refund period. The Power Commission bases its whole contention as to jurisdiction on the power of the court below to equitably

distribute the impounded fund, citing in this connection the case of *United States* v. *Morgan*, 307 U. S. 183. That case, however, did not involve any question of the usurpation of state legislative powers by a federal court. It simply held that the court below should retain the fund there in question until the Secretary of Agriculture had concluded his administrative proceedings. It constitutes no authority to negative the proposition that there are limitations upon the extent to which a federal court may go in disposing of a fund in its possession, which limitations are inherent in the nature of the jurisdiction exercised by a federal court. As stated by this court in *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, at 273:

> "District courts may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority to prescribe rates, both because that is a function reserved to the state, and because it is not one within the judicial power conferred upon them by the Constitution. See *Newton* v. *Consolidated Gas Co., supra; Reagan* v. *Farmers' Loan & T. Co.*, 154 U. S. 362, 397, 38 L. ed. 1014, 1023, 14 S. Ct. 1047, 4 Inters. Com. Rep. 560; *Honolulu Rapid Transit & Land Co.* v. *Hawaii*, 211 U. S. 282, 53 L. ed. 186, 29 S. Ct. 55; cf. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 S. Ct. 445; *O'Donoghue* v. *United States*, 289 U. S. 516, 77 L. ed. 1356, 53 S. Ct. 740."

Payment of the fund in dispute herein to the ultimate consumers by the court below has the practical effect of rate-making by the court, retroactive to be sure, but nevertheless rate-making.

IV.

The legislative history of the Natural Gas Act clearly shows that the benefits of interstate rate reductions were to flow to the ultimate consumers only through the exercise of powers vested in the local regulatory bodies.

Under sub-point D of point I of the Commission's brief it is asserted that since the Natural Gas Act was passed in the public interest it must follow that the Act vests in the Federal courts unrestricted power to award funds accumulated in their possession as a result of orders temporarily staying rate reduction orders of the Federal Power Commission directly to the ultimate consumers. If this had been the intention of Congress by the Natural Gas Act it certainly could have been expressly covered by the inclusion in the Act of provisions to that effect. No such provisions are contained therein and the attempt of the Commission on page 28 of its brief to construe Section 4(a) of the Act to that end is unjustified to say the least. The Commission certainly must know that the words "in whose behalf" contained in Section 4(a) were intended to cover a circumstance where the relationship of principal and agent exists. Surely not even the Commission intended to assert that the petitioner is merely an agent for its customers in purchasing natural gas at wholesale from a natural gas company. No court has ever announced such a doctrine. Likewise no court, other than the court below, has ever determined that a local distributor of natural gas is merely a "conduit" between a natural gas company and its customers. On the contrary, the courts have recognized by a myriad of cases that a local distributor is entitled to have its rates fixed by the regulatory body having jurisdiction in the premises on such a basis that it will earn not less than a fair return on its investment. This of course involves a consideration of all of the factors involved in rate making and the cost of

natural gas is only one of those factors. Since all public laws are passed in the public interest, certainly this fact alone is insufficient to establish a complete reservoir of power in the Federal courts which is expressly denied by the Constitution.

The Commission also contends under sub-point D of point I of its brief that the legislative history of the Natural Gas Act establishes that Congress intended thereby that the fund here in dispute should be paid directly to the ultimate consumers. As pointed out under sub-point C of point II of the petitioner's brief, the legislative history of the Act does not establish any such thing. On the contrary it definitely indicates a plan of cooperative endeavor between the Federal and State regulatory bodies to the end that each body acting exclusively within its own sphere shall establish reasonable rates, which, of course, is all that is necessary or provided for in the Natural Gas Act for the protection of the ultimate consumers. Indeed the material set forth in Appendix B of the Commission's brief contradicts its contentions in this regard. This is demonstrated by a short excerpt from Appendix B at pages 54 and 55 whereat the following appears:

> "The object of this bill is to supply regulation in those cases where the State commission has no power to regulate.
>
> There are, however, some situations defined in the bill to which this regulation does not apply. One is local distribution on the principle that where commerce passes in interstate commerce and reaches the point of broken package, the local State commission then has the regulatory power. That same general rule applies to the transportation and sale of gas. So this act does not affect the local distribution of gas. *It affects the local consumer's price only by regulating the price at the city gates.* The facilities for local distribution are not within the power of regulation provided in the bill." (Italics ours.)

In view of the legislative history of the Natural Gas Act, it is obvious that the same was particularly designed to complement and in no manner to interfere with the powers of local regulatory bodies over the retail distribution of natural gas and that the arguments of the Commission to the contrary are without any foundation whatsoever.

At page 31 of its brief the Commission states that in practice almost all distributing utilities have acquiesced in the proposition that a fund, representing excessive wholesale rates, belongs to the consumers and adverts to the fact that most of the local distributors in the instant case disclaimed any interest in the general fund. This statement is unfounded inasmuch as there is nothing in the record to disclose why most of the local distributors involved filed disclaimers. If the Commission is interested in what prompted the filing of the disclaimers, it should consider the Federal Excess Profits Tax.

V.

Petitioner's claim against the fund was foreclosed by the orders below.

The Federal Power Commission argues (Point I, Commission's brief) that since petitioner's first claim is based upon a claim of inadequacy in its retail rates, which is a matter determinable under Iowa law, the court below was justified in relinquishing jurisdiction of the impounded fund for disposition by a state court or body and that such action did not have the result of foreclosing petitioner's claim against the fund. This position of the Commission entirely overlooks three vital points:

(1) While the orders of the court below purported to be without prejudice to petitioner making claim against said fund in some other "court or body having jurisdiction thereof" (R. 130-131), nevertheless both

orders entered on February 14, 1944, contain findings that the fund belongs to the ultimate consumers;

(2) The court below, in purporting to relinquish jurisdiction of the fund did not direct its payment to a stake holder or return the fund to the natural gas companies to be held by them subject to the claims of parties interested therein, but directed payment of the fund to the local officials on behalf of the ultimate consumers; and

(3) The order of the court below entered on March 11, 1944 (R. 146) was a direct denial of the petitioner's claim to the impounded fund as a matter of legal right and contained no reservation that it was entered without prejudice.

From the foregoing it is clear that petitioner's claim against the impounded fund was foreclosed by the orders entered below. If the court below was in fact relinquishing jurisdiction of the fund so as to permit a determination of petitioner's rights therein by some other court or body having jurisdiction over petitioner's rates, then simple justice demanded that the fund be relinquished without the court below having incorporated in its orders of February 14, 1944, its previous ruling and its findings that the fund belongs to the ultimate consumers. Incorporating such findings in an order, purporting to relinquish jurisdiction without deciding the claims of adverse parties to the fund, was highly irregular to say the least and could only have the effect of being prejudicial to petitioner in any further proceedings elsewhere.

While petitioner does not question the right of a Federal court under circumstances such as those existing in the case of *Pennsylvania* v. *Williams*, 294 U. S. 176, and the other cases cited by the Commission on that point, to relinquish its jurisdiction in favor of state courts, or other bodies or officers, where its exercise concerns a matter which may more properly be settled by a state court, petitioner con-

tends that is not what was done by the court below in the instant case. Such reliquishment of jurisdiction by a Federal court is, as established by the cases mentioned, proper where there is a state court or state body or state officer designated and empowered by state law to administer the funds or other assets and where the procedure provided by the state law is adequate and complete and accomplishes the same end in substantially the same manner as would be reached in the proceedings pending before the Federal court. In other words, relinquishment may be made to a proper stake holder where the rights of claimants to the funds or assets will not be prejudiced by such relinquishment of jurisdiction by the Federal court and where the parties will receive substantial justice by some authority authorized to adjudicate their claims. Certainly a relinquishment of jurisdiction by payment of funds to one of the parties in interest, although accompanied by a declaration that the adverse party might thereafter sue in some other forum to establish his right in the fund held by the other claimant, does not fall within the circumstances under which a Federal court of equity is justified in relinquishing jurisdiction. As mentioned in petitioner's original brief (p. 36), the Iowa municipalities are not granted, by statute, power to make reparation awards or to receive, administer or distribute the fund here in dispute. These municipalities are neither courts, state bodies nor state officials empowered by law to hear and adjudicate the claims of the petitioner or of the ultimate consumers to the impounded fund. That fact, coupled with the findings made by the court below that the fund belongs to the ultimate consumers, makes it obvious that the payment of the fund to the local officials has none of the aspects of a relinquishment by the court below of its jurisdiction to a state court or body having jurisdiction, but was tantamount to delivery of the fund to the ultimate consumers who were parties to the controversy pending before the court below.

Such an act was a clear abuse of discretion by the court below since it constituted actually deciding the case, under the guise of relinquishing jurisdiction to do so.

No extended comment is necessary on the proposition that the denial of petitioner's supplemental petition with prejudice has the effect of foreclosing petitioner's claim.

CONCLUSION.

The instant case may be summarized as one wherein the court below, having impounded a fund consisting of excess charges paid by petitioner to the natural gas companies during the refund period which, as a matter of law, belongs to petitioner, denies petitioner's claim to the fund on the ground of legal right and, under the guise of relinquishing jurisdiction over the fund, directs payment of the fund to the local officials on behalf of the ultimate consumers (the other claimants to the fund) with findings that the fund belongs to such consumers, relegating petitioner to some other forum or body for the enforcement of its rights.

In support of this action on the part of the court below it is argued by the Power Commission and the City of Muscatine that the court below had jurisdiction to hear the equitable claim of the ultimate consumers based on the ground that their retail rates were excessive during the refund period (although the court below denied itself jurisdiction to hear petitioner's claim based on the ground that the retail rates were inadequate) and had equitable jurisdiction to distribute the fund directly to the ultimate consumers, although such determination and disposition amounts in fact to the fixing of local rates by the court below. The Power Commission requests this Court not merely to approve the action taken by the court below, which the Power Commission alleges did not go far enough, but also to sit as a trial court and determine for itself that the equities of the ultimate consumers are superior to those

of petitioner and to do so upon a partial statement of the facts which, so far as those bearing on the matter of petitioner's inadequate rates are concerned, were not presented to or heard by the court below.

Petitioner's contention is that the court below did not in fact relinquish jurisdiction to the state authorities without prejudice to petitioner's rights, but that the action by that court amounted to an actual decision by the court, in the exercise of equitable jurisdiction, to award the fund to the ultimate consumers, in reparation for alleged excessive local rates paid by them during the refund period. Petitioner's position is that the court below did not have jurisdiction to award the fund to the ultimate consumers based on the ground that the rates charged them by petitioner during the refund period were excessive since that constituted a retroactive fixing of such rates by the court and that the court was therefore bound to direct payment of the fund to petitioner as the claimant with a legal right thereto. In other words, the disposition of the impounded fund must be made according to the strict rules of contractual privity since, in order to attempt to distribute the fund on the basis of equitable principles, the court would be required, under the guise of exercising equity jurisdiction, to exercise a legislative power which is vested exclusively in the state. Such an over-extension of equitable jurisdiction is beyond the intent of Congress in the Natural Gas Act for the purpose of providing federal regulation over interstate traffic to supplement local state regulation, and will result in an invasion of state rights.

In view of the foregoing, it is respectfully submitted that the orders of the court below should be reversed and the relief sought by the petitioner herein granted.

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